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ABSTRACT

Developments due to the rapid expansion of technology have resulted in recent changes to U.S. copyright law. President Clinton signed the Digital Millennium Copyright Act into law in 1998, an action that reflects the growing interest our society, and especially higher education, is experiencing in copyright and other intellectual property issues. This digest offers a brief overview of some of the current intellectual property issues related to patents, licenses, and copyright. (JM)

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Change on the Age of Technology: A New Look at Licensing and Copyright Issues for Colleges and Universities

James H. Walther

INTRODUCTION

Developments due to the rapid expansion of technology have resulted in recent changes to U.S. copyright law. In an action that reflects the growing interest of technology in our society and especially in higher education, President Clinton signed the Digital Millennium Copyright Act into law in 1998. This law provides guidelines for campuses to use in creating copyright policy. This digest will offer a brief overview of licensing and copyright issues, as well as practical advice and resources for further examination.

AN EXAMINATION OF LICENSING ISSUES

Because of advances in technology, copyright issues are being examined under a new light and university administrators, faculty and librarians are involved in licensing issues now more than ever. Currently, several licenses are signed throughout institutions of higher education. Software licenses are signed for staff, faculty, and student use through departments of information systems or offices of technology. University libraries are confronting substantial licensing issues, including the temporary licensing and usage of CD-ROMs and publisher created databases, which have recently begun to create requirements and/or definitions of authorized user requirements. Because most licensed electronic information tools are not purchased outright, unlike purchasing a book, libraries will need to examine the types of control the license granter has placed on the usage of the information. In most licenses, the tenets of the copyright law do not apply, since the user of an electronic source has the ability to directly disseminate or download substantial portions of the publisher's intellectual property (Bielefield and Cheeseman, 1999). Parallel to copyright law, the primary concern of the product creator is the long-term need for the product and/or promotion of software or information in the marketplace. To ensure the university is in complete compliance upon signing, the signatory officials should receive full definitions of all terminology used in the license such as "browsing," "transmitting," "displaying," "resident server," "downloading," "printing," etc. Licenses can either considerably enhance or limit resources and access to technological tools depending on the language of the license.

LICENSES: OPPORTUNITY FOR COST CONTAINMENT AND REVENUE DEVELOPMENT

Purchasing licenses for information products, rather than purchasing software and databases outright, may be one way for a college or university to contain costs. An institution may also need to create a user license for its own information prior to making it available to others. With the growth and popularity of educational technology and distance education, intellectual property has the potential to yield great revenue in the future. A case study of the Florida Distance Learning Network, established by the Florida Legislature in 1995, found revenue created by distance education initiatives were allowed to be reinvested in programs as resulting income for the institution (Florida State Legislature, 1995). Revenue is currently seen as the course and the curriculum, but future revenue to the university may be seen through a variety of copyrighted or licensed materials created by the university, such as the course syllabus, online journals, assignments, faculty research reports, case study modules and examination courseware. The reallocation of the revenue obtained from intellectual property create several questions, including how the university will invest or distribute the revenue and whether it will be funneled solely to the department of creation (AAUP, 1998). While the large majority of higher education institutions use the Internet for disseminating information, approximately only one fourth of public four-year colleges and, on average, one third of public and private research universities have a policy on faculty developed intellectual property available on the institutional website (Green, 1999). As higher education continues to use the technology and the Internet, of great concern will be the ability to protect individual and institutional intellectual property through licenses and the basics of copyright law.

THE BASICS OF THE U.S. COPYRIGHT LAW

Today, the practice of photocopy reproduction is common on campuses in the U.S. However, as shown in case law, all types of copying do not fall under a blanket of fair use exceptions only because they occur on a college campus. The following offers the development of a working knowledge of the copyright law under the provisions of "fair use". This first step in learning about copyright law can be found in Section 107 of the Copyright Act of 1976, which permits users to reproduce copyrighted material without permission from the copyright owner as long as the user meets each of the four factors that determine "fair use." The four factors are a test as to what constitutes fair use reproduction and each factor is applied to each use of a copyrighted work. These factors (or tests) include: 1) *The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes:* On campus copying by individuals (faculty, staff and students) is usually within the nonprofit definitions of usage, with the exception of situations analogous to the Basic Books v. Kinko's Graphics Corp., where the court found profit in connection to the campus related copying (Crews, 1995; Wagner 1991). 2) *The nature of the copyrighted work:* Factual works, rather than fiction, are usually favored for the inclusion of fair use copying, since the original, legislative intent of U.S. Copyright Law was to expand the dissemination of ideas (Hemnes, Pyle, McTeague 1994; Wagner 1991). 3) *The amount and substantiality of the portion copied in relation to the copyright work as a whole:* Courts have not set up systems of page number counts or percentages of the original works that determine substantiality. The determinate would be the amount of intellectual content used (Hemnes, Pyle, and McTeague; 1994, Kasunic 1993; Wagner 1991). 4) *The effect of the use upon the potential market for or value of the copyrighted work:* Market impact has been the most important element of the four factors in determining fair use exceptions, as determined by the U.S. Supreme Court (Kasunic, 1993). Guidance for university

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administrators and faculty members evaluating copying activities is found in determining whether or not copyright holders will suffer financial damage by the copying occurring in their institutions.

COMPLIANCE THROUGH THE CCC: A RESOURCE FOR INSTITUTIONS AND INDIVIDUALS

One mechanism designed to assist with the legal compliance of the copyright doctrine, is the Copyright Clearance Center (CCC). Congress created the CCC to act as an important intermediary authority designed to assist people and institutions within and beyond the elements of fair use. As members of higher education may, at times, need to reproduce documents beyond the exceptions of fair use, the CCC will assist in obtaining the required permission for copying such works. This copying will also require the copying body to pay royalties to the copyright holder, a process also managed by the CCC (Copyright Clearance Center, 1999; Toma and Palm, 1999). Increased institutional use of the CCC as an intermediary body may result in stronger relationships between publishers and the higher education community as the fair use rights on campuses will continue to be re-examined. This relationship will continue to be enhanced because of the new copyright legislation.

THE DIGITAL MILLENNIUM COPYRIGHT ACT

The new act referred to as the Digital Millennium Copyright Act (DMCA) was signed into law by President Clinton on October 28, 1998. This law required the input from copyright owners and educators specifically on changing Section 110 of the copyright law to facilitate the use of digital technology for distance education. This input created a report, released from the U.S. Copyright Office, to Congress in May 1999. Of greatest interest under this act is the definition of the on-line service provider (OSP). The university, as a provider of the Internet and a means for copyright infringement, must take action in response to a complaint from a copyright holder, since the university is providing the means for infringement. The university will be required to eliminate access to the infringing material, notify the violator posting the material and force the violator to work with the copyright holder. Further information and clarification is available from the American Library Association [Appendix 2].

Since the DMCA and the May report are new, administrators are cautioned to review the language of the law. EDUCAUSE has provided the following information for institutions to review (Lide, 1999):

"A Quick Checklist for Campus Actions"

- Ensure appropriate campus expertise and resources to deal with copyright issues
- Determine who will be the campus agent to receive notification of copyright infringement from the Copyright Office
- Develop or update campus policy and procedures on copyright
- Post the campus policy online
- Register the campus agent with the Copyright Office
- Educate the community about the law and promote compliance

ACTION FOR THE FUTURE

Institutions must examine the purposes for their copying. Again, fair use copying is allowed at educational institutions for scholarly activities. However, some campuses may continue to copy materials to use illegally in activities such as marketing, service promotion or attracting enrollment (Burk, 1998). An analysis of the true purpose for the copying must be mandated to ensure compliance with copyright law. With the growth and adaptation of new technologies in the campus setting, proliferation of electronic publishing, distance education, and access to information online, institutions have a greater interest in clarifying their options and abilities under the fair use doctrine (Gorman, 1998; Wolcott, 1998). Evolving technology and intellectual property law will continue to present challenging situations for administrators, faculty, staff and students in the higher education community. By developing, implementing and enforcing appropriate policies and procedures, institutions of higher education can reap the benefits of evolving technology and as well as comply with all legal requirements Early intervention partnerships with colleges provide a significant opportunity for "at-risk" students to have the available resources, funding, curriculum, and guidance to enter postsecondary education. Beginning as early as kindergarten and progressing through high school, encouragement for students to enter college and receive a baccalaureate degree gives "at-risk" students the much needed support and extra attention they need. Many "at-risk" students need this help to successfully apply, attend, and graduate from college. Using early intervention strategies: (1) eliminates the boundaries between schools and colleges, (2) discourages student drop-out, and (3) gives students hope to pursue entrance into college. Active participation by school counselors, teachers, school and college administrators, college student support staff, and faculty generates involvement between schools and colleges but also eases the transitions from one institution to another.

Case Law and Legislation, Appendix One

American Geophysical Union v. Texaco, 60 F 3d 913 (2nd Cir. 1994)

Basic Books v. Kinko's Graphics Corp. 758 F. Supp 1522 (S.D. N.Y. 1991)

The Digital Millennium Copyright Act of 1998. Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

Sony Corporation of America v. Universal City Studios, 464 U.S. 417 (1984)

Internet, Appendix Two

American Library Association. The Digital Millennium Copyright Act, Highlights of New Copyright Provision Establishing Limitation of Liability for Online Service Providers, Executive Summary. http://www.ala.org/washoff/oup.html

Berkely Digital Library SunSITE. Copyright, Intellectual Property Rights and Licensing Issues. http://sunsite.berkeley.edu/Copyright

EDUCAUSE. Current Issues. The Digital Millennium Copyright Act. http://www.educause.edu/issues/dmca.html

Oberson, A. Association of American Universities and Association of Research Libraries Intellectual Property Task Force. *Copyright Resources Online.* http://library.yale.edu/~oberson/copyright.html

Stanford University Libraries. *Copyright and Fair Use.* http://fairuse.stanford.edu/multimedi

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U.S. Copyright Act, codified at 17 U.S.C. Section 101-1010

Wagner, E.N. (1991). *Beware the custom-made anthology: Academic photocopying and "Basic Books v. Kinko's Graphics".* West's Education Law Reporter 68 (1), 1-20. EJ 431184

Wolcott, L.L. (1998). *Faculty issues pertaining to institutional support and reward practices in distance education.* [Paper presented at the Annual Meeting of the American Research Association, 1998.] ED 419530

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